



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Petchem Inc.

File: B-222958

Date: July 11, 1986

DIGEST

Where a restriction imposed by a local authority, rather than by the contracting agency, creates a sole-source procurement because of the protester's inability to obtain a necessary operating franchise from the authority, the matter is not for consideration under the General Accounting Office's bid protest function.

DECISION

Petchem Inc. protests the proposed award of a sole-source contract to Port Everglades Towing, Inc. (PET) under request for proposals (RFP) No. N68836-86-R-0041, issued by the Department of the Navy. The procurement is for tug and towing services for naval vessels at Port Everglades, Florida. Petchem complains that the proposed award is improper because PET is the only firm presently franchised by the Port Everglades Authority to perform tug and towing services in Port Everglades, and, therefore, Petchem will be denied an opportunity to compete under the RFP. We dismiss the protest.

The Port Everglades Authority, which was created by special acts of the Florida State Legislature in 1927, has sole jurisdiction over the harbor of Port Everglades including the exclusive right to grant franchises to firms to operate tug and towing services within the Authority's jurisdictional area. Pursuant to the Authority's governing charter, applicants for tug and towing franchises must establish to the Authority's satisfaction that the franchise "is needed for the public convenience and necessity." It is undisputed that PET is the only firm to date that has been granted a franchise to operate these services within the harbor of Port Everglades.

PET has held a sole-source contract from the Navy since 1979 to provide tug and towing services for naval vessels at Port Everglades. (According to the Navy, the requirement was sole-sourced in 1979 because prior attempts at competition were unsuccessful.) However, on October 24, 1985, the Navy issued solicitation No. N68836-85-R-0106 (RFP-0106) requesting proposals for the requirement at Port Everglades. According to the Navy, the solicitation was issued to 23 potential sources with the

036023

intent to obtain competition. Nevertheless, because the Port Everglades Authority had advised the Navy of the sole franchise arrangement with PET, and because the Authority had indicated that there was no present reason to grant additional franchises, the solicitation cautioned all prospective offerors that an award would only be made to a firm "franchised to perform services at Port Everglades, Florida."

The Navy later determined that, because of the Port Everglades Authority's exclusive jurisdiction, it would be unable to challenge PET's franchise arrangement, and, consequently, the Navy canceled RFP-0106 on December 2 with the intent to issue a new solicitation contemplating a sole-source award to PET.

On December 30, the Navy published notice of its proposed negotiation of a sole-source contract with PET in the Commerce Business Daily (CBD). On January 6, 1986, Petchem filed a protest with this Office against the proposed procurement action, but the firm withdrew its protest a few days later. The record shows that Petchem had received a letter from the Navy dated January 9, which advised Petchem that RFP No. N68836-86-R-0041 (RFP-0041) had been synopsisized in the CBD and that a sole-source award to PET was intended. Petchem also received a letter from the Navy's Competition Advocate dated January 14, in which the Competition Advocate stated, in pertinent part:

"The Navy is fully committed to obtain competition for its supplies and services to the maximum extent possible, consistent with the Competition in Contracting Act of 1984 (CICA). With regard to the situation at Port Everglades, Florida, I will contact the appropriate Port officials and request that they open up the Port to competition in compliance with the spirit of CICA and point out the benefits of competition we all share."


RFP-0041 was issued on April 1, with a closing date of May 1. Petchem then filed the present protest with this Office against the proposed sole-source award to PET on April 29.

We conclude that Petchem has failed to state a valid basis for protest, as required by 4 C.F.R. § 21.3(f) (1986). Although it is the established policy of this Office to scrutinize closely sole-source procurement actions, see Jervis B. Webb Co. et al., B-211724, et al., Jan. 14, 1985, 85-1 CPD ¶ 35, it is obvious that Petchem's complaint is directed more against the Port Everglades Authority than against the Navy, which is constrained by the Authority's exclusive jurisdiction over Port Everglades to award the tug and towing requirement to PET, the only present holder of a franchise from the Authority. We view Petchem's dissatisfaction with Port Everglades Authority as a dispute between

private parties which cannot be adjudicated by this Office. See International Business Aircraft, Inc.--Request for Reconsideration, B-219346.2, July 11, 1985, 85-2 CPD ¶ 42. Where a restriction imposed by another entity, rather than by the contracting agency, creates a sole-source procurement because of the protester's inability to obtain the necessary approvals to operate from that entity, the matter is not for consideration under our bid protest function. Id. at 2.

We note that Petchem also alleges that the tugs employed by PET are not properly fendered. This allegation involves the firm's responsibility as a prospective contractor to perform the contemplated contract. An affirmative determination of PET's responsibility must be made by the Navy before any contract may be awarded to the firm, Federal Acquisition Regulation, 48 C.F.R. § 9.103 (1984), and such determinations generally are not reviewable by this Office. See Sylvan Service Corp., B-219077, June 17, 1985, 85-1 CPD ¶ 694. The Navy states, however, that it has investigated the matter and has found that PET's tugs, in fact, are suitably fendered.

The protest is dismissed.



Ronald Berger
Deputy Associate
General Counsel